United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7127

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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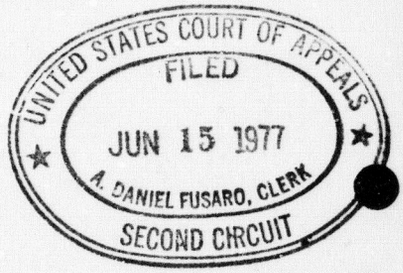

TERENCE J. MOORE

Plaintiff-Appellant

V.

ANTHONY M. SLONIM

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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ARGUMENT

1. Issues Raised by Appellant in Appellant's Brief are Validly Raised.

The Appellee, Anthony Slonim by his attorney in his Brief, in the first argument, in his first statement, page one claims:

"The District Court did not decide this case as a summary judgment." He then proceeds to make general statements and reach conclusions based on these general statements, all in less than two full pages. Unfortunately, his general statements gloss over, and thus ignor, complex, but relevant, legal issues that are crucially involved in the case-at-bar. While Appellant fully agrees with Appellee that it is not enjoyable to read or research and write a substantial brief, the Appellant feels that since complex but crucial legal issues are involved, and since it is his right to due process of law that is involved, said issues must be properly and adequately brought before the Court, and not glossed over and ignored as Appellee does in less than five full pages of his brief. Appellee's conclusions, based on his general statements, do not take into account these precisely relevant and important legal issues, ignor the right to due process of law and are gross over-simplifications in an attempt to convince the Court that the complex but relevant legal issues and due process of law should be ignored. Appellee also fails to cite any authority at all to support his argument.

Appellee's first statement, "The District Court did not decide this case as a summary judgment case."is totally false and erroneous. The District Court most certainly did decide this case as a summary judgment.

Appellee-Defendant, in his own Motion for Dismissal of Action and Default, in the very first two lines, states himself that: "The defendant in the above-entitled action moves, pursuant to Rule 12 (b) (6) that...."(emphasis added). Thus, his motion to dismiss, by his own statement, is based on Rule 12 (b) (6), which is "(6) failure to state a claim upon which relief can be granted...."

Rule 12 (b) goes on to state, however, that

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment....."(emphasis added)

Thus, if the movant bases his motion to dismiss on (6) and the Court considers matters outside the pleadings the court must then treat the motion as one for summary judgment. It is mandatory for the Court to do so in such circumstances. It has no choice but to do so.

The District Court considered the bankruptcy record. This was considering matters outside the pleading, which it did without appellant's knowledge.

Since Appellee, in his own motion, stated that the motion was made pursuant to Rule 12 (b)(6), and the Court considered the bankruptcy record, under Rule 12 (b) it had to treat the motion as one for summary judgment, and could not treat it otherwise. Thus, the District Court Judge's Ruling was a summary judgment.

The cases firmly support this contention. Cases in Appellant's brief already are support but three New York cases also support Appellant's position. In FRA S.p.A. v. Surg-O-Flex of America, 415 F. Supp. 95 (D.C.,N.Y.1976) the Court held that if the Court accepts

any material beyond the pleadings in connection with the motion to dismiss for failure to state a claim, the motion to dismiss will be converted into one for summary judgment under Rule 12 (b). In Rich v. Touche Ross and Co., 415 F. Supp. 95 (D.C., N.Y. 1976) the Court held the same rule, stating that where material outside the scope of the pleadings was considered by the Court in determining a motion to dismiss for failure to state a claim, the motion would be treated as a motion for summary judgment. In Looney v. Great American Insurance Company, 71F.R.D. 211 (D.C.N.Y.1976) the Court followed the same stare decises. See also Robinson v. U.S., 408 F. Supp. 132 (D.C.Ill.,1976); Slegeski v. Ilg, 395 F. Supp. 1253 (D.C.Conn. 1975).

The United States Court of Appeals clearly support the Appellant's position. In Plante v. Shivar, 540 F. 2d 1233 (C.A.N.C.,1976) the Court of Appeals held that where the district court was presented with and considered matters outside the pleadings, and where those matters were not excluded from consideration by the Court, but, on the contrary, were specifically mentioned in its memorandum opinion dismissing the action, under those circumstances the district court was obligated to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in the summary judgment rule. Cases following the same rule are U.S. v. Lewisburg Area School District, 539 F. 2d 301 (C.A.Pa.1976); and Smith v. Blackledge, 451 F 2d 1201 (C.A.N.C. 1971).

Appellee apparently argues that since Appellant received a notice from the District Court that he could request an oral argument at which he could present further evidence or testimony if he wished, and since Appellant failed to do so, he has waived any issues of fact and therefore the District Court could decide any issues of fact.

This argument by Appellee is false, erroneous, directly contradicts existing law, and, if followed, denies Appellant fundamental due process of law.

First, while Appellant received such notice, the notice mentions nothing about the fact that the judge is going to consider the motion to dismiss as one for summary judgment or that the judge is going to look at the bankruptcy files. Cases previously cited in Appellant's brief establish that the notice to the nonmoving party must notify him that the judge is going to look at matters outside the pleading, and must notify him that the judge is treating the motion as one for summary judgment. It is contended that while Appellant received notice that he could request oral argument and present further evidence or testimony, this was not sufficient notice to comply with Rule 12 (b), Rule 56, or to give Appellant due process of law. The judge had to give notice to the Appellant that the motion was being treated as one for summary judgment, and also notice that he was going outside the complaint to look at the bankruptcy files. Since he did not do so, Appellant received inadequate and improper notice. Appellee states in his brief that "he should have disputed the bankruptcy record at that time...." It was impossible for the Appellant to dispute the bankruptcy record at that time since the District Court never informed him at that time that it was going to look at the bankruptcy record and consider said record. One cannot dispute something one is unaware of.

Without full notice of what the District Court was doing or going to do the Appellant was denied any opportunity to respond to the motion in the appropriate manner, namely as a motion for summary judgment where the judge was going to look at the bankruptcy record. The

Appellant only had an opportunity to respond to the motion as strictly a motion to dismiss.

Second, the next fallacy in Appellee's argument that the issues are raised too late is that it assumes that the Appellant had an affirmative duty to begin with to establish issues of fact at that time by presenting testimony or affidavits, and since the Appellant failed to do so, it is assumed by Appellee's argument, that said failure to affirmatively act in such a manner waived all issues of fact and hence the District Court could then decide the issues of fact. Again, Appellee's argument in this regard directly contradicts existing law, and, if followed, denies Appellant the most basic due process of law.

The material issues of fact in the case-at-bar arise inherently from the complaint in and of itself. Therefore there was no need or duty of the Appellant to affirmatively do anything to establish issues of fact. They had already been clearly and well established inherently by the complaint. Further, the Appellant, in his motion to strike and in his thirty-one page brief affirmatively raised material issues of fact.

Finally, even assuming for the sake of argument only, arguendo, that the Appellant failed to raise any issues of fact prior to the District Court's Ruling on the motion, the Court still could not decide any issues of fact that existed, since issues of fact cannot be decided without a trial. To decide issues of fact without any trial on the issues of fact is to deny the most basic and fundamental due process of law. Since

issues of fact existed at that time in the case-at-bar, the District Court could not decide them based on a pre-trial motion of any kind, regardless of whether the Appellant raised said issues of fact or not. Thus, the question of whether the issues of fact were raised too late by the Appellant is not even an issue at all and is entirely irrelevant and moot.

This very Court of Appeals, itself, has decided four recent cases which support the Appellant's contentions. In United States v Bosurgi, 530 F. 2d 1105 (C.A.N.Y.1976) this Court itself stated:

> "Summary judgment is a drastic remedy to be granted only where the requirements of Rule 56, F.R. Civ. P., have clearly been met. A motion for such a judgment does not entitle the court to try issues of fact. Its function is limited to deciding whether there are any such issues to be tried. In making that determination it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought... with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute." (emphasis added)

Further, in Jaroslawicz v. Seedman, 528 F. 2d 727 (C.A.N.Y.1976) this Court stated:

> "Summary judgment cannot be sustained merely because the judge believes that the party against whom it is entered is unlikely to prevail on the merits after a trial. To be successful on a Rule 56 application, it must be established that there are no genuine issues of material fact. The responsibility of the district judge on a motion for summary judgment is merely to determine whether there are issues to be tried, rather than to try the issues himself via affidavits."(emphasis added)

Further, in Lowenschuss v. Kane, 520 F. 2d 255 (C.A.N.Y.1975) this Court itself held that where the defendant, before answering, moved to dismiss the complaint for insufficiency on its face, plaintiff's failure to submit affidavits or other proofs on particular issues did not mean that such issues were not genuinely disputed for purposes

of judging the availability of summary judgment, but only that they had not yet been reached. Specifically, this Court itself stated:

> "..we must be careful, in analyzing the award of summary judgment, not to assume that plaintiff's failure to submit affidavits or other proofs on a particular issue means that it was not genuinely disputed. Plaintiff has been faced with no contentions concerning the undisputed character of the facts and understandably had not put in any affidavits or other proofs to establish his version. Therefore the absence of any offer of proof by one or all parties on factual issues that we deem to be material and genuine should not imply that the matter is undisputed, but merely that it has not yet been reached."(emphasis added)

Based on the above cases decided by this Court itself and upon the foregoing it is contended that whether the factual issues were raised too late is not even an issue at all and therefore not relevant. Material questions of fact were raised by the complaint itself and the very existence of material questions of fact precluded the District Court from determining said questions of fact without a trial.

Further, cases from New York reinforce this firm rule of law. In Stan Togut Corp. v. Hobat Mfg. Co., 398 F. Supp. 1323 (D.C.N.Y.1974) the Court held that in order to prevail on a motion for summary judgment the moving party must clearly show (1) that there is no genuine issue as to any material fact in the case; and (2) that he is entitled to judgment in his favor as a matter of law.

In American Electric Power Co., Inc. v. Westinghouse Electric Corp., 418 F. Supp. 435 (D.C.N.Y.,1975) the Court stated that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. In Arneil v. Ramsey, 414 F. Supp.334

(D.C.N.Y.1976), the Court held that on a motion for summary judgment the district court cannot try issues of fact, but can only determine whether there are issues to be tried. See also National Life Insurance Co. v. Solomon, 529 F. 2d 59 (C.A.N.Y.1975), decided by this Court; Teledyne v. Eon Corp., 373 F. Supp. 191 (D.C.N.Y.1974); and Berns v. Civil Service Commission, City of New York, 417 F. Supp. 17 (D.C.N.Y.1975); Oliver v. Village Voice, Inc., 417 F. Supp. 235 (D.C.N.Y. 1976) all of which support Appellant's contentions.

Three other cases should be mentioned since they are applicable to Appellant's contentions. The Court of Appeals, in United States v. General Motors Corp., 518 F. 2d 420 (C.A.D.C.1975) held that the party seeking the summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden of proof at trial, and even if the opponent presents no conflicting evidentiary matter.

Likewise, the Court of Appeals, in Hamilton v. Keystone Tankship Corp., 539 F. 2d 684 (C.A.Cal.1976) held that the party against whom the motion for summary judgment is directed need not file any contravening evidence or affidavits but is entitled to a denial of the motion where there are genuine issues of material fact that exist.

In Bezalek v. City of Elmhurst, 70 F.R.D. 636 (D.C.Ill.1976) the Court clearly held that even if the plaintiff fails to produce evidenciary material in support of his complaint, the burden remains on the defendant to prove that there is no material issue of fact to be decided on a motion for summary judgment.

See also Felix v. Young, 536 F. 2d 1126 (C.A.Mich.1976); Rivera Morales v. Benitez de Rexach, 541 F. 2d 882(C.A.P.R.1976); U.S. Steel Corp. v. Darby, 516 F. 2d 961(C.A.Ala.1975); Kellerman v. Askew, 541 F. 2d 1089 (C.A.Fla.,1976); Smith v. Blackledge, 451 F. 2d 1201 (C.A.N.C. 1971); Cousins v. Yaeger, 394 F. Supp. 595(D.C.Pa.,1975); Goodman v. Poland, 395 F. Supp.660 (D.C.Md.1975); Glowacki v. Borden,Inc. 420 F. Supp. 348 (D.C.Ill.1976); Pudlik v. Public Service Co. of Colorado, 166 F. Supp. 921(D.C.Colo.1958) and endless further authority.

Thus, Appellant's motion had to be treated as one for summary judgment under Rule 12(b). It was a motion for summary judgment. Appellant received inadequate and improper notice, denying Appellant the opportunity to respond to the motion as it was being treated. Further, plaintiff's very complaint in and of itself raised material issues of fact. In addition, Appellant, in his motion to strike and in his memorandum in support of his motion to strike and in opposition to Appellee's motion did affirmatively raise material issues of fact. But Appellant was under no duty to affirmatively raise issues of fact. There were and are material issues of fact that existed then and exist now. Therefore, the Appellee's motion had to be denied. By doing otherwise the District Court denied Appellant due process of law. Appellee's argument that Appellant raised issues too late is not even an issue involved in the case-at-bar, and therefore is irrelevant.

But Appellee contends that the District Court "decided the case on the plaintiff's complaint." This is not correct, but assuming for the sake of argument, arguendo, that this is correct, the District Court

still committed gross error in making its Ruling. Even if the District Court did decide the case solely on the Appellant-Plaintiff's complaint, it still could not decide issues other than those raised by the complaint, and further, it still could not decide material questions of fact.

Nowhere in the complaint is anything about bankruptcy mentioned whatsoever. Yet the District Court decided the case on the premise that the Appellant-Plaintiff was a bankrupt, after looking at bankruptcy records. Thus, the Court decided the case on matters that were not contained in the complaint. This was improper and erroneous. Cases already cited in Appellant's brief, pages 18-20, already have established that if the Court is going to decide the motion on the complaint it cannot consider matters not alleged in the complaint, that are outside the complaint. Otherwise the motion has to be treated as one for summary judgment. The Court erred in doing so in the case-at-bar.

Further, even if, solely for the sake of argument, the District Court decided the motion on the complaint it nevertheless cannot decide material issues of fact in doing so. Yet the Court precisely did decide material issues of fact that existed then and exist now. For example, even if the Court did decide the motion on the complaint how could it possibly decide the material issue of fact as to whether there was injury to Appellant-Plaintiff's reputation? It could not do so. Yet the Court decided this material issue of fact, as it decided other material issues of fact. Even if the Court decided the motion on the plaintiff's complaint this certainly did not allow it to decide any material issue of fact that could only be determined by examining evidence at a trial. Yet the Court did decide many material issues of fact.

Further, the Court could not decide questions of law in the case-at-bar without basing said decisions on prior determinations of material questions of fact, which could not be determined without a trial.

Thus, even if it is assumed, solely for the sake of argument, arguendo, that the District Court did decide "the case on the plaintiff's complaint,"the Court erred in rendering its Ruling.

The Appellee in his Brief, page 2, apparently feels that it is important that the claim for back wages was not listed as an asset on June 11, 1976. Why this is so important he fails to point out. The crucial point is that the claim for back wages was included in the bankruptcy record when the District Court looked at the bankruptcy record when it did, due to the amendment filed on July 21, 1976, and therefore the Court mistated the facts when it said the claim for back wages was not listed as an asset. Further, an amendment to a bankruptcy petition is valid ab initio. Once filed, it is considered effective as of the date of the filing of the original petition. Here, it is hence effective, ab initio, on June 11, 1976. But the point is that the District Court certainly should have been aware that the claim was included as an asset when it examined the bankruptcy record as the claim had long been in said record at that time.

Appellee, in his Brief, on page 2, also cites the case of Dallas Cabana, Inc. v Hyatt Corporation, 441 F. 2d 865, 868 (5th Cir. 1971) and contends that Appellant-Plaintiff's remedy, in any event, "was to petition the Bankruptcy Court for an order authorizing abandonment so that he can pursue the action. " This case is inapplicable and irrelevant and

Appellee's above-quoted statement is false and erroneous.

The trustee in bankruptcy has long impliedly abandoned the claim by the Appellant. The trustee has known about the claim since July 6, 1976 when Appellant testified, as to the claim in bankruptcy court. The trustee also knew about the claim since July 21, 1976 when the amendment listing the claim was filed. Further, the trustee examined Anthony M. Slonim concerning the claim in January, 1977. So the trustee has known of and had notice of the claim for just about a full-year. Yet in an entire year the trustee has done nothing whatsoever about said claim. The trustee has let the claim just sit and has done absolutely nothing about it. This constitutes an implied abandonment of the claim by the trustee. The trustee has impliedly abandoned the claim. See Watson v. Planters and Citizens Bank, 140 SE 2d 30, 110 Ga App 725.

The appellee, in his Brief, on pages 2-3, quotes the phrases "back unpaid salary"and "unpaid back salary"in Appellant-Plaintiff's complaint in an attempt to use them to his advantage. But the Appellee, in using them, quotes them out of context, and out of the manner in which they were used in plaintiff's complaint. He uses the classic technique of using them out of the context in which they were used.

2. Claims Are Separate Causes of Action and Have Not Passed to Trustee.

The very title itself of Appellee's second argument, on page 3 of his Brief, is misleading and calculated to attempt to broaden in scope what is actually a narrow rule of law. The Appellee's second argument, in its title reads, "Claims Related to Contract Dispute",

implying that any claim related in any way to a contract dispute passes to the trustee. This is not the rule of law at all. The actual rule of law is much narrower and holds that any claim arising out of a contract passes to the trustee. The requirement of the actual rule is that the claim must arise out of the contract, not merely that the claim is related to a contract dispute. There is a significant difference between the two, as already pointed out in Appellant's initial Brief at pages 42-44. The requirement in the actual rule, that it must "arise out of" is a much narrower requirement than "related to", which is much broader in applicability. Thus, the Appellee mistakes the applicable rule of law in the very title to his second argument, in an attempt to establish a bogus rule of law, self-made by Appellee, so broad in its applicability that if it is used the Appellee would argue that almost everything in existence relates to a contract dispute in some manner. He has misstated the rule of law in an attempt to perpetrate bogus law on us to his own advantage.

Appellee, on page 3 of his brief, states that the plaintiff has merely stated self-evident general propositions. First, Appellant's statements are not general at all, but are a quite precise statement of the laws on precise, complex but crucially relevant legal issues that the Appellee would prefer to see ignored and glossed over with his over-simplified, all-encompassing, general rules of law, which is to his advantage. Again, Appellee is attempting to say that his broad sweeping statements of the law solve all issues and that the Court should ignore the precise, complex but crucially relevant legal issues presented by

the Appellant. This is the classic advocacy technique of when you cannot validly rebut precise relevant issues you "muddy the waters" with statements that are over-simplifications and so broad that they cover everything, in the hopes that the precise, complex but relevant issues are thereby ignored amidst the resulting confusion.

Appellee, as an example, makes the sweeping statement, on page 4, that "The cases principally relied on by the plaintiff simply do not involve the situation here." He then proceeds to make very short half-sentences in an attempt to distinguish Appellant-Plaintiff's cases from the case-at-bar, based on insignificant differences of facts. There are no two cases in the entire world that have the same exact facts. By Appellee's alleged reasoning, apparently, therefore, every single case can be distinguished from every single other case in the world since some facts will always be different. It is apparent, therefore, that if one follows Appellee's approach, no cases would ever apply to any case-at-bar and the entire system of stare decisis is hence useless. Based on this reasoning Appellee admits that all cases cited and used by him are entirely irrelevant, due to the fact that they contain different sets of facts. The truth of the matter is that the cases cited and used by the Appellant are indeed applicable to the case-at-bar in the manner in which the Appellant contends.

Appellee, on page 3 of his Brief, brings up the concept of "consequential damages"and contends that this concept is important and applicable. He is wrong and in error. Consequential damages has nothing to do with the case-at-bar.

As already extensively argued in Appellant's initial brief, the cause of action for negligence and the cause of action for fraud are entirely separate causes of action from the claim for unpaid back wages; they do not arise out of the said claim. The causes of action for fraud and negligence came into existence completely after the claim for unpaid back wages had already accrued, and the causes of action for fraud and negligence did not arise out of any contract. This has all been extensively explained in Appellant's initial Brief. Appellee conveniently ignores any detailed discussion on this matter, and ignores the detailed discussion in Appellant's initial brief, since to consider any details would prevent him from glossing over the precise legal issues involved, as he has continually done. Therefore, Appellee's whole argument as to "consequential damages" is irrelevant and inapplicable in the case-at-bar.

Appellee, on page 4 of his Brief, states "the plaintiff's artful attempts to plead around the bankruptcy laws.....", intimating that the Appellant is trying to avoid the bankruptcy court. Throughout this litigation the one basic, recurring, central contention always made by the Appellee is that since the Appellant filed bankruptcy just about everything he has, claims or does is subject to the bankruptcy court. The Appellant's very existence is apparently subject to the bankruptcy court. The Appellant is sure that, if found necessary to contend, the Appellee would contend that the Appellant, since he is subject to the bankruptcy court, must obtain the written permission of the bankruptcy court to buy food, eat and breathe, travel, take a job, accept a paycheck, whether

to spend it and how, where to live, etc. In essence, the Appellee wants everything concerning the Appellant to be subject to the bankruptcy court. In good faith the plaintiff-appellant filed his causes of action for fraud and negligence because in good faith the plaintiff-appellant is of the view that they are totally separate causes of action from anything in the bankruptcy proceeding, including the claim for unpaid back wages. In good faith he contends that the causes of action for fraud and negligence never passed to the trustee.

In regard to the Reichart cases, 428 P 2d 860 (1967) and 442 P 2d 377 (1968), for the sake of argument: The most important point on which these cases are distinguishable is that the plaintiff in the Reichart cases, supra, stated in his original complaint and in his subsequent amended complaints that he had been adjudicated a bankrupt on July 24, 1964. "He did not offer in his second amended complaint under review in the subsequent cite, any explanation asserting that such prior allegation of bankruptcy was made as the result of mistake or inadvertance and explaining that its ommission from the common counts is for the purpose of correcting an error."

In addition in the Reichart case, 442 P 2d 377, the transcript of the oral argument on the demurrers discloses plaintiff's unequivocal statement that the second amended complaint was as well pleaded as he could make it, and that the trial Judge, if he were inclined to sustain the demurrers, should do so without leave to amend. Therefore in the Reichart case, supra, the Court stated:

> "..bankruptcy allegation appears as well established.... Thus examining them, we conclude that the common counts were also vulnerable to the demurrers...
>
> "Plaintiff nowhere alleges that his bankruptcy caused the $1,500,000 damages which he seeks to recover....."

Therefore the only dispute with regard to the sufficiency of the allegations in the Reichart case, 442 P 2d 377, was as to whether the plaintiff had sufficiently alleged that as a result of the bankruptcy caused by the wrongful refusal to settle, plaintiff suffered losses.

In the case-at-bar, appellant-plaintiff did not state in his complaint that he had been adjudicated a bankrupt. Plaintiff did file a Motion to Strike Defendant's Motion to Dismiss in which he affirmed that he was the proper party to sue. The brief to plaintiff's motion to strike only repeated defendant's allegations as to plaintiff's being the improper party to sue in the following context and wording, "the defendant's entire rationale and argument is based upon an assumption, which is stated as a conclusion, that is false and invalid."(page 2, Brief to Motion to Strike). Nowhere in his brief in the district court does plaintiff state that the bankruptcy is an injury.

In his brief in this Court of Appeals, plaintiff inadvertently and mistakenly does state that "The filing of the bankruptcy itself was an injury in itself to the plaintiff. The other injuries...."(page 42 line 1&2 Appellant-Plaintiff's Brief). This portion of the brief, drafted by a single plaintiff, pro se, with nowhere near the time, expense or deliberation used by statutory draftsmen and legislators, is excusable as inartfully and mistakenly drawn and was meant to be interpreted and read and should be read and interpreted as follows, "That for the sake of argument the filing of the bankruptcy was a cause of injury to plaintiff-appellant. The injuries suffered by the plaintiff were....." That the statement in plaintiff-appellant's original brief was not meant to be an admission as to his injuries being consequential damages.

In the case-at-bar, the plaintiff-appellant used the Reichart case, 428 P 2d 860 (1967) only to the point of law that the actual injury to the plaintiff did not occur to plaintiff until after the bankruptcy petition was filed due to the defendant's fraud and negligence. Although inartfully drawn, the wording, "The filing of the bankruptcy itself was an injury in itself to plaintiff. The other injuries....."(page 42, line 1&2 of Plaintiff-Appellant's Brief) was not intended by Plaintiff to mean that the bankruptcy itself was the injury, but only that the injuries to the Plaintiff did not occur until after the filing of bankruptcy. Plaintiff did not and does not infer it to be an admission that his injuries are consequential damages.

The contention that the Court held that a claim for damages caused by the bankruptcy itself arises after the cleavage date and thus does not vest in the trustee, in the case of Reichart v General Insurance Co. of America, 428 P 2d 860 (1967) was never reversed by the subsequent ruling in the Reichart case, 442 P 2d 377 (1968) as the ruling in the later case was based on the fact that the cause of action arose out of an insurance contract, that plaintiff nowhere alleged that his bankruptcy caused the damages he was seeking to recover, and that the adjudication of the plaintiff as bankrupt was on the face of the complaint and undisputed. The subsequent ruling can be distinguished from the case-at-bar by the fact that the Plaintiff-Appellant contends that his injuries arose out of a tort action of fraud and negligence, and that the only relevancy the bankruptcy has, if any, is that the cause of action came into existence only after the date of the filing of the Petition of Bankruptcy, those injuries caused by the bankruptcy only coming into existence after the

the filing of the bankruptcy and that nowhere on the face of the complaint had the plaintiff-appellant ever stated that he was adjudicated a bankrupt.

Though inartfully drawn, due to the brief being drafted by a single plaintiff, pro se, with nowhere near the time, expense and deliberation used by statutory draftsmen and legislators, it is excusable as inartfully and mistakenly drawn(on page 42, line 15 of Plaintiff-Appellant's Brief in this Court, stating, "The rule of law is established that where the cause of action comes into existence by the actual injury being the bankruptcy itself.....") and should have read and was intended to be read as "The rule of law is established that where the claims of damages were caused by the bankruptcy itself the cause of action is held to have come into existence after the date of filing of the bankruptcy."

The Reichart case, 442 P 2d 377, is distinguishable from the case-at-bar in that the contract upon which the plaintiff sued in the Reichart case, supra, was an insurance contract for damages caused by a fire to plaintiff's motel and the refusal of the insurance company to settle the claim quickly thereby forced plaintiff into bankruptcy, whereas in the case-at-bar Plaintiff is suing defendant for fraud and negligence which are totally separate from anything in the bankruptcy proceeding, including the claim for unpaid back wages. That the acts of fraud and negligence caused plaintiff loss of reputation and credit among other injuries. That even for the sake of argument in the alternative that it did arise out of a contract, it was an executory personal service contract, not an insurance contract and damages were to the person of the bankrupt and not his property.

CONCLUSION

The Appellant certainly does not wish to unduly burden the Court with a lengthy brief that is unnecessary. But in the instant case there are precise, complex but crucially relevant legal issues that necessitates an adequate discussion of said issues, thereby resulting, by necessity, in a lengthy brief. The Appellee presents a five-page brief, which contains statements that are gross over-simplifications and which gloss over and thereby ignor the real, precise, and complex legal issues actually involved in the instant case. Being fully aware that the Court's caseload is heavy, the Appellee hopes that the Court will follow his five-page brief and ignor the real, precise, and complex legal issues upon which the case-at-bar really turns. The Appellant is confident that the Court will fully review the issues and arguments presented by the Appellant and will place the attainment of justice in priority to the rapid disposition of caseloads.

THE JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE SHOULD BE REVERSED AND THE COMPLAINT REINSTATED.

Respectfully submitted

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